NIK ADLI NIK ABDUL AZIZ

v.

KETUA POLIS NEGARA

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CRIMINAL APPLICATION NO: 44-7-2001]
4 OCTOBER 2001

PREVENTIVE DETENTION: *Detention - Application for habeas corpus - Application filed at pre-detention order stage - Detainee served with detention order a day before hearing of application - Jurisdiction of court to hear application - Bona fides of detaining authority - Internal Security Act 1960, ss. 8, 73*

PREVENTIVE DETENTION: *Detention - Whether lawful - Whether detaining authority complied with s. 73(3) Internal Security Act 1960 - Whether detainee informed of grounds of arrest - Whether detaining authority acted in mala fide - Whether detainee's right to criminal trial denied - Internal Security Act 1960, ss. 8, 16, 73 - Federal Constitution, art. 151*

CRIMINAL PROCEDURE: *Habeas corpus - Internal Security Act 1960, s. 73, detention under - Whether detaining authority complied with stringent conditions under s. 73(3) - Whether detainee informed of grounds of arrest - Whether detaining authority acted in mala fide - Whether detainee's right to criminal trial denied - Internal Security Act 1960, ss. 8, 16, 73 - Federal Constitution, art. 151*

This was an application for a writ of *habeas corpus* for the release of the detainee held under s. 73 of the Internal Security Act 1960 ('ISA'). At the time of the filing of the application, the detention objected to was the pre-detention order stage, *ie*, the detention prior to the signing of the detention order by the Minister of Home Affairs under s. 8 ISA. On the day of the hearing, the respondent raised a preliminary objection ('PO') that as the detainee had been served with a s. 8 order the day before the hearing, the court now had no jurisdiction over the matter. It was alleged on behalf of the detainee that the issuance of the said order a day before the hearing only compounded the *mala fide* conduct of the respondent.

Held:

[1] Any constitutional infringement of the rights of the detainee prior to the issuance of the detention order will certainly taint the subsequent impugned detention order. Therefore, the PO should be dismissed. (p 164 h)

[2] There is no provision in s. 73 ISA that denies the detainee the right to apply for a *habeas corpus* writ during the sixty days detention period (pre-detention order stage). Even though s. 73(7) does promulgate that the said detention shall be deemed lawful, the detainee is certainly at liberty to rebut that presumption. However, no allegation had been canvassed by the detainee which indicated that there was failure on the part of the detaining authority to adhere to the stringent conditions of s. 73(3). (pp 165 f-g & 166 c)

[3] As a person shall be informed as soon as may be of his grounds of his arrest (followed simultaneously by the right of representation), it must mean that the grounds must have already been in existence when he was arrested. What may be delayed due to some extreme exigencies of the moment is only limited to the informing. But that should not be construed as a *carte blanche* prerogative by the arresting officer to delay in fulfilling his duty of informing the detainee of the grounds as an unexplained delay could render the detention order invalid. In the present case, the facts showed that the authorities did inform the detainee of the grounds of his arrest. Further, there was no specific allegation in the affidavits stating that the detainee had not been informed of the grounds of his arrest, let alone that he had been deprived of sufficient legal representation. (pp 167 i, 168 a, b, i & 169 a-b)

[4] Under s. 73(7) ISA, any person detained under the powers conferred by s. 73 shall be deemed to be in lawful custody. He may be detained in any prison, or in any police station, or in any other similar place authorised generally by the Minister. This deeming provision also covers the pre-detention order stage and not merely after the detention order has been perfected. The detainee failed to rebut that deeming provision. (p 169 c)

[5] There are sufficient authorities to reject the allegation that the ISA is legislated purely to stamp out communism in Malaysia. That being so, the allegation that the invocation of that Act was *mala fide* could not stand. (p 169 e-f)

[6] The denial of the detainee's rights to go through the processes of a normal criminal trial was no bar to the current exercise of detaining him under s. 73 ISA prior to the issuance of the s. 8 detention order. (p 170 g)

[Application dismissed.]

Case(s) referred to:

Athappen Arumugam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1984] 1 MLJ 67 ***(foll)***

Bombay v. Atma Ram Sridhar Vaidya [1951] SCR 167 ***(refd)***

Cheow Siong Chin v. Menteri Dalam Negeri, Malaysia & Ors [1985] 1 CLJ 229; [1985] CLJ (Rep) 59 ***(refd)***

Daud Salleh v. The Superintendent, Sembawang Drug Rehabilitation Centre [1981] 1 MLJ 191 ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 ***(foll)***
Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212 ***(refd)***
Musa Salleh v. PP [1973] 1 MLJ 167 ***(refd)***
Ooi Ah Phua v. Officer-In-Charge of Criminal Investigation, Kedah/Perlis [1970] 1 MLJ 28 ***(refd)***
Re PE Long & Ors v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 133 ***(refd)***
Re Tan Boon Liat [1976] 2 MLJ 83 ***(refd)***
Re Tan Sri Raja Khalid Raja Harun v. Inspector General of Police [1988] 1 MLJ 182 ***(refd)***
Thakur Prasad Bania v. State of Bihar AIR [1955] SC 631 ***(foll)***
Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293 ***(foll)***
Yeap Hock Seng v. Minister of Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 ***(foll)***

Legislation referred to:
Federal Constitution, arts. 5(1), (3), 151(3)
Internal Security Act 1960, ss. 8, 16, 73(1), (3), (7)

For the applicant - Zamani Ibrahim (Sulaiman Abdullah); Zamani Ibrahim Tarmizan & Co (M/s Zain & Co)
For the respondent - Zainal Abidin Yusof (Tun Majid Tun Hamzah) DPP

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar J:
On 25 September 2001 a hearing took place before me to move the court to issue a writ of *habeas corpus*, praying for the release of the detainee held on 4 August 2001 under the Internal Security Act 1960 (hereinafter interchangeably referred to as 'the Act'). The applicant had canvassed that as the detention was not in accordance with law, the detention thus was unlawful and hence entitled to that writ. Pursuant to that incarceration, the detainee's wife in her affidavit had affirmed that pro-active steps had been undertaken to obtain information and/or visit the detainee, but had been met by stony administrative silence. Much of the contents of the supporting affidavits filed were hearsay based, or sourced from the local newspapers.

Some of the supposed grounds for the detention were that the detainee was connected with the killing of one Dr. Joe Fernandez on 4 November 2000, involved with the attack of the Guar Cempedak police station, participated in the armed robberies of Southern Bank and Hong Leong Bank both in Petaling Jaya, respectively on 18 May 2001 and 14 December 2000, involved with the al-Maunah incident at Bukit Jenalek, and lastly participated in the attack on a Hindu temple on 26 October 2000 at Jalan Pudu. In the voluminous

supporting affidavits, there was absolute denial that the detainee had been involved in any of the above-mentioned incidents, let alone with the local Mujahidin.

It must be made clear at the outset that the words "supposed grounds" had been adverted to, as at the stage of the filing of the action, apart from no contact having been made with the detainee, hence the dearth of information of the 'grounds', the detention order was yet to be issued against the detainee. On that score no definitive grounds could be gauged. It was also indisputable that at the time of the filing of the application, the detention objected to pertained the infancy stage (enquiry and processing stage) ie, prior to the signing of the detention order by the Minister of Home Affairs. Came the hearing day ie, the abovementioned 25 September 2001 counsel for the applicant unleashed the bombshell that the detainee, a day before, had been served with a detention order pursuant to s. 8 of the Internal Security Act 1960 (Act 82). With the issuance of that order, new and different considerations surfaced which beset and perplexed everyone. Not surprisingly, armed with the new set of facts the learned senior deputy public prosecutor posed a preliminary objection, pressing home that with the drastic change in the status of the matter, no living issue thus survived; with no cause of action pending the application therefore had degenerated to being frivolous, and lastly due to the turn of events the court had ceased to have jurisdiction, at least in regard to the respondent (*Cheow Siong Chin v. Menteri Dalam Negeri, Malaysia & Ors* [1985] 1 CLJ 229; [1985] CLJ (Rep) 59; *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh* [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212; *Ooi Ah Phua v. Officer-In-Charge of Criminal Investigation, Kedah/Perlis* [1970] 1 MLJ 28; *Re P.E Long @ Jimmy & Ors v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 133). The applicant in response had no qualms in alleging that the eleventh hour issuance of the order, mere hours before the hearing, only compounded the *mala fide* conduct of the respondent.

At the end of their respective submissions I dismissed the preliminary objection. As I do not wish to belabour this point, suffice if I merely comment that as the detention order must have been substantially founded on the preliminary acts undertaken by the police before its issuance, and as there was no evidence of any intervening factors in the like of a rearrest of the detainee, it naturally followed that the end product could not be disassociated with those earlier acts. Therefore any constitutional infringement of the rights of the detainee prior to the issuance of the detention order will certainly taint the subsequent impugned detention order. A simple scrutiny will reveal that close and intimate kinship between ss. 73 and 8. To grant the preliminary objection would have meant that I had pre-judged the detention order as being unblemished, without even sifting through the evidence beforehand.

With the preliminaries over and as there was no application of postponement, in spite of the turn of events, I thenceforth proceeded with the application proper. The main allegations asserted by the applicant were that as:

a. the Act was legislated purely to stamp out communism in Malaysia, and with the current facts construable as being outside the preamble of the Act, a wrong law thus had been alluded to. The act of the authorities stamped of *mala fide*;

b. the authorities had failed to positively state in MR1 (a police report which was contemporaneous in nature), that the arresting officer had informed the detainee of the grounds, thus creating a state of ambiguity. On that premise the benefit of the doubt must be given to the applicant; and

c. that the facts for the arrest were unclear. A lack of transparency thus had existed, particularly so as the authorities had sought refuge behind two dubious provisions *viz*. s. 16 of the Act and art. 151(3) of the Federal Constitution.

Bearing in mind that the legality of the detention order must depend on the quality of the initial acts of the authorities prior to the issuance of the order, it therefore necessitates me to curb my scope of consideration before arriving at any adjudication. This restrictive self-imposition of the court's jurisdiction to identify the authorities' faults, if any, has to be made as no complaint had been ventilated over matters crystallising from the period of the issuance of the detention order, and onwards. How could I go beyond the delineated sphere when the exact contents of the detention order had not even been made a point of contention by the applicant?

But can the applicant file for a writ of *habeas corpus* based on the acts and processes prior to the issuance of the detention order? Reading the provision of s. 73 or for that matter appreciating the whole Act, I must confess to have failed to identify any provision which could deny the detainee the right to apply for a *habeas corpus* writ, during that sixty days detention period (pre-detention order stage). Even though s. 73(7) does promulgate that the said detention shall be deemed to be lawful, the detainee is certainly at liberty to rebut that presumption.

I similarly failed to pick out any provision that prevented the detainee from alleging and establishing, that his detention during the 'sixty days period', had not been in accordance with the law. He will certainly not be prevented from alleging that he was detained for more than twenty four hours by an officer holding a rank below that of an inspector; that he was detained for more than forty eight hours on the authority of an officer below the rank of assistant superintendent; or he was detained for more than thirty days, with a police officer of or above the rank of deputy superintendent not having reported the

circumstances of his arrest and detention to the Inspector General or to a police officer designated by the Inspector-General. Even if the matter had been reported to the Inspector-General or to the designated police officer, he could still allege that that reporting officer held the rank subordinate to that of a deputy superintendent. Additional to all these, the detainee could still complain that the Inspector-General of Police or the designated officer had not forthwith reported the circumstances of the arrest and detention to the relevant Minister. If the detainee could successfully prove that an imperative ingredient had been wanting, which was in contravention of any of the statutory prerequisites, the detainee would certainly be entitled to a writ of *habeas corpus*. As it stood having perused the evidence, no allegation had been canvassed which indicated that there was failure on the part of the detaining authorities to adhere to the stringent conditions of s. 73(3), thus turning the above possible allegations academic.

I now will attempt to delve into the allegations of the applicant and decide whether they are worthy of consideration. Due to the nature of the allegations, in that they are inter-related, I will deal with the second and third allegations together first, *viz.*:

That there was doubt whether the detainee had been informed of the grounds of his arrest, and that there was lack of transparency when the authorities had sought refuge behind two dubious provisions viz. s. 16 of the Act and art. 151(3) of the Federal Constitution respectively.

Due to the peculiar facts staring at the court, it is necessary for me to resolve the third allegation first. It is generally accepted that the run of the mill cases for *habeas corpus*, relate more to a scenario after the relevant Minister has signed the impugned detention order, for obvious reasons. By then all the parties would be mutually aware of the facts, which will be subject to intense scrutiny by them and upon which the judge will thenceforth deliberate. Evidence that is not strictly admissible may even be considered (*Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129). Invariably too, apart from these facts being meticulously documented in affidavits and the affidavits-in-reply of the concerned parties, exhibits will also be attached to them, inclusive of the relevant controversial detention order.

It is at this stage too that the court will be able to gauge more clearly, *inter alia*, whether at the time of arrest the detainee had been informed of the arrest *(Re P.E Long @ Jimmy & Ors (supra)*. This is an elementary right in a democratic country, as otherwise the detainee will remain in custody, without knowing why he has been deprived of his liberty. Hand in hand with that fundamental right is the dual right of legal representation. It will be pointless to know the reason of his arrest, unless an opportunity is also provided for, to permit him to seek redress.

At this informed stage too the court will be able to know whether the Minister had acted in a *mala fide* manner, and whether that Minister or any of the relevant authorities, had been lackadaisical in their work when processing the matter at hand (*Karam Singh v. Minister Hal Ehwal Dalam Negeri* (infra at 157); *Yeap Hock Seng v. Minister of Home Affairs, Malaysia (infra)*). It must be borne in mind that once a detainee challenges the detention by a petition for *habeas corpus*, it is for the authority, which has detained him to show that that detention was in exercise of a valid and legal act. Once that is done the burden shifts, in that it is now for the detainee to show that the power had been exercised *mala fide* (*Daud bin Salleh v. The Superintendent, Sembawang Drug Rehabilitation Centre* [1981] 1 MLJ 191; *Bombay v. Atma Ram Sridhar Vaidya* [1951] SCR 167; *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279). Abdoolcader J in *Re Tan Boon Liat* [1976] 2 MLJ 83 at p. 84 had occasion to remark:

> Where the detention under the relevant preventive detention law is not *bona fide,* the detention is illegal. An order can be said to have been made *mala fide* where there is malice in law though there may be no malice in fact and this may be deemed to exist where an order is made contrary to the objects and purposes of a particular preventive detention law or when the detaining authority permits itself to be influenced by considerations which are outside the scope of the legislation.

With the evidence being sufficiently adduced, a decision could be made, as to whether any substantive law had been breached, whether *mala fide* could be detected or some serious procedural defect had taken place, justifying and warranting the issuance of a writ of *habeas corpus*.

To appreciate the matter better, it is also necessary for me to mirror a preview of the potential scenario prior to the issuance of the impugned detention order (for easy reference to be called 'pre-detention order stage'). Matters will not be transparent then, as the relevant facts will have yet to surface openly. This is so as the necessary paper work, investigations and inquiries may still be pending, with nothing much having been documented. Even the facts that surround the 'pre-detention order stage' let alone the grounds, which are conclusions drawn from the facts, are yet to be documented. It is based on this reasoning that the grounds of his arrest may not be readily available exactly at the time of arrest, but only at some point of time, as permitted by the legislated phrase of "as soon as may be", provided for under art. 5(3) of the Constitution. Notwithstanding that, the liberty of a detainee cannot be taken lightly if the deprivation of personal liberty is not carried out "in accordance with law" (art. 5(1) of the Federal Constitution). It is thus trite that as a person shall be informed as soon as may be of the grounds of his arrest (followed simultaneously by the right of representation), it must mean that the grounds

must have already been in existence when he was arrested. What may be delayed, perhaps due to some extreme exigencies of the moment as stated above, is limited only to the informing. But this remark should not be construed as a *carte blanche* prerogative by the arresting officer to delay in fulfilling his duty, of informing the detainee of the grounds, bearing in mind that an unexplained delay could render the detention order invalid.

For purposes of this case, the subjective reasons which had led to that arrest by the police officer, must have been because he had reasons to believe that the availability of grounds justified the detention of the detainee under s. 8, and that the latter had acted or was about to act or likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof (*Musa bin Salleh v. Public Prosecutor* [1973] 1 MLJ 167; *Re Tan Boon Liat* [1976] 2 MLJ 83).

Returning to the factual legal posers *viz.* the two allegations under discussion, which are intertwined with legal precepts, I will start off with the view that a prognosis of s. 16 of the Act and art. 151(3) is unnecessary in the circumstances of the case. This is in spite of the lengthy submission by the applicant over this point. The refusal of the authorities to reveal the detailed facts, with the latter provisions as their refuge, does not strengthen the case of the applicant, or for that matter deride the act of the authorities in the light of the following dissertation.

Section 73(1) which deals with matters pending inquiries, provides that "Any police officer may arrest ... in respect of whom he has reason to believe ... that there are **grounds** which would justify his detention." A subjective test as said earlier is on the card here. That being so the sufficiency of the grounds will depend on the requirement of that arresting officer. Needless to say, the satisfaction of that officer must be based on some grounds, for there could be no satisfaction if there are no grounds. Proceeding from here, it is indisputable that facts and grounds are two totally different terminologies, with the latter dependent on the other. Both the provisions ostracised by the applicant are restricted to disclosure of facts, which are against the national interest, not in relation to 'grounds'. To wind up this minor poser, any non-disclosure of the facts, covered by s. 16 of the Act or art. 151(3) of the Federal Constitution certainly does not affect the quality or the requirement of the authorities to inform the grounds of the arrest to the detainee.

After having perused the affidavits in particular encl. 16 para. 7, encl. 3A para. 8(8)(b), and encl. 3B para. 7 which are self explanatory, it is my factual finding that the authorities did inform the detainee of the grounds of his arrest (issue of second allegation). I have arrived at this finding in spite of the accusation that the authorities had "failed to positively state in MR1 (a police

report which was contemporaneous in nature), that the arresting officer had informed the detainee of the grounds", and thus "a state of ambiguity had existed". More in point, after having perused the affidavits, regretfully I was unable to identify any specific allegation in the affidavits stating that the detainee had not been informed of the grounds of his arrest, let alone that he had been deprived of sufficient legal representation.

To wind up on these two legal posers, under s. 73(7) any person detained under the powers conferred by s. 73 shall be deemed to be in lawful custody. He may be detained in any prison, or in any police station, or in any other similar place authorised generally by the Minister. After due deliberation, I am of the view that this deeming provision also covers the scenario of the 'pre-detention order stage', and not merely after the detention order has been perfected. Needless to say, after arriving at the above observations, I am satisfied that the applicant, upon whom the onus has fallen, had failed to rebut this deeming provision (*Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182).

I now touch on the first allegation.

The Act was legislated purely to stamp out communism in Malaysia, and with the current facts being outside the preamble of the Act, a wrong law thus had been alluded to. The Act of the authorities stamped of mala fide. There are sufficient authorities in law books to reject the above allegation that the ISA was legislated purely to stamp out communism in Malaysia. That being so, the allegation that the invocation of this Act smacks of *mala fide* cannot stand. This matter may be resolved promptly, and without much ado by merely reproducing the remarks of Salleh Abas LP in *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293 at p. 295 when His Lordship said:

> We are not impressed ... nor are we persuaded to accept that the scope of the ISA, and in particular, preventive detention, should be limited to those involved in communist insurgency and subversion only.

Even though counsel for the applicant had not submitted on the detainee's eligibility to be prosecuted under the Penal Code instead of being detained, as affirmed in the affidavits, that is if an offence had been detected, I find it quite proper to deal with it regardless. The detainee's wife who had adverted to the comments of SUHAKAM in a local tabloid, which read "Charge Them Suhakam Tells Government", speaks volumes of the relevancy of this legal poser. To start off on this issue, permit me to refer to the dictum of the Indian Supreme Court in *Thakur Prasad Bania v. State of Bihar* AIR [1955] SC 631, which reads:

> It may be that where the grounds on which a detention order is based are also the subject matter of a criminal prosecution, the order of detention may amount to an abuse of the statutory powers. But this does not mean that such an order is necessarily *mala fide*. Such a circumstance calls for a scrutiny as to the *bona fides* of the detention order but the question of *bona fides* has got to be decided as one of fact with reference to all the circumstances of an individual case.

Azmi LP in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (supra)* at p. 138 had stated:

> In India it has been held in *Jhala Joubha v. The State* that whether a person should be prosecuted under the ordinary law or the Government should exercise their powers under the Preventive Detention Act is for the authorities to decide.
>
> In my view therefore, the failure in this case of the minister to proceed against the appellant under the criminal law of the country is no indication that he has acted in bad faith.

Abdoolcader in *Yeap Hock Seng v. Minister for Home Affairs, Malaysia (supra)* at p. 284 had occasion to opine:

> Mere circumvention of the ordinary process of law cannot by itself amount to *mala fides* as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for specified purposes.

In *Athappen a/l Arumugam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* ([1984] 1 MLJ 67), Edgar Joseph Jr. J (as His Lordship then was), in no uncertain terms decided that the mere fact a subject had been detained under the law of preventive detention, following his acquittal in a criminal court, did not *ipso facto* render his detention wrongful.

In the current case, the detainee not only has not been acquitted but also has yet to be charged in a criminal court. Supported by the above views, the denial of the detainee's rights to go through the processes of a normal criminal trial is no bar to the current exercise of detaining him under s. 73, prior to the issuance of the s. 8 detention order.

After having considered the available facts and law I have no compunction in rejecting the application without costs.